LIM KUI SIAM & ANOR.
(REPRESENTING ALL THE MEMBERS OF PERSATUAN PENDUDUK-PENDUDUK KAWASAN HJ. MANAN, KLUANG)

v.

PENTADBIR TANAH, DAERAH KLUANG

HIGH COURT MALAYA, MUAR
TUAN LOW HOP BING JC
[ORIGINATING MOTION NO. 25-25 TAHUN 1994]
7 OCTOBER 1994

***ADMINISTRATIVE LAW**: Application for leave to issue order of certiorari to quash decision of Land Administrator - Decision of Land Administrator made pursuant to the provisions of the National Land Code 1965 - S. 418 NLC provides aggrieved person with remedy of appeal - Whether applicants can apply to Court for leave to issue certiorari without first exhausting remedy of appeal.*

***ADMINISTRATIVE LAW**: Application for leave to issue order of certiorari to quash decision of Land Administrator - Whether on the facts as disclosed there is an arguable case to enable the Court to exercise its discretion to grant leave to issue certiorari.*

The applicants applied, by way of originating motion, for leave to issue an order of certiorari to quash the decision of the respondent contained in the letter dated 4 August 1994 which is a notice to quit.

The questions that arose for decision were;

(1) whether, where the decision of the respondent is made under and pursuant to the provisions of the National Land Code (NLC) and s. 418 thereof makes available to the aggrieved person/s the remedy of appeal, can the applicants apply to this Court for leave to issue certiorari without first exhausting the remedy of appeal and;

(2) whether, on the facts as disclosed in all the affidavits filed, there was an arguable case to enable the Court to exercise the discretion to grant leave to issue certiorari.

Held:

[1] The applicants herein have an alternative remedy of appeal under s. 418 of the NLC. This is the domestic remedy which is of special application to the applicants. It is a statutory right conferred upon the applicants and other persons similarly circumstanced and should be exhausted by the applicants first before they can invoke the remedy for judicial review by way of certiorari.

[2] It is the duty of the applicants to prove the existence of very exceptional circumstances in order to obtain leave from the Court to issue certiorari. The applicants' affidavit has not deposed to any exceptional circumstance at all. In the circumstances, the application for leave to issue certiorari is misconceived.

[3] The legitimate expectation raised by the applicants is grounded upon the payment of assessment by the applicants to the local authority for the use of the premises on State land. Such payment has been seriously disputed by the respondent and the applicants have not discharged the burden of proof as required of them under ss. 101(1) & 106 of the Evidence Act 1950.

[4] The affidavit in support of this originating motion and the applicants' Statement of facts made no mention or reference whatsoever to the payment of the assessment by the applicants to the local authorities. In the circumstances and on the facts of the case, there is no arguable case.

[Application dismissed with costs]

Cases referred to:
Re Application by Dow Jones (Asia) Inc. [1988] 1 MLJ 222 ***(refd)***
Inland Revenue Comrs. v. National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617; [1981] 2 All ER 93 ***(refd)***
Government of Malaysia & Anor. v. Jagdis Singh [1987] 2 MLJ 185 ***(foll)***
Lai Cheng Cheong v. Sowartnam [1983] 2 MLJ 113 ***(not foll)***
Regina v. Special Commissioners of Income Tax (Ex Parte Morley) [1972] 49 TC 71 ***(refd)***
Re Low See Kim [1988] 3 MLJ 110 ***(refd)***
Sidek bin Haji Muhamad & 461 Ors. v. Government of the State of Perak & Ors. [1982] 1 MLJ 313 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53 r. 1(2)
National Land Code 1965, s. 418
Evidence Act 1950, ss. 101(1), 106

For the applicants - Lim Hwa Beng; M/s. H.B. Lim, Farha & Lim
For the respondents - Abdul Rasid bin Sudin, Penolong kepada Penasihat Undang-Undang Negeri Johor

JUDGMENT

Low Hop Bing JC:

Application for Leave to Issue Certiorari
The applicants representing all the members of the Persatuan Penduduk-Penduduk Kawasan Hj. Manan, Kluang, apply by way of originating motion (encl. 2) for, *inter alia*, leave to issue an order of certiorari to quash the decision of the respondent contained in the letter dated 4 August 1994 which is a notice to quit.

Statement of Facts
The Statement filed by the applicants pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980 is as follows:

(1) The applicants in these proceedings are the representatives of the members of the Persatuan Penduduk-Penduduk Kawasan Hj. Manan, Kluang, being the chairman and the secretary thereof. All the members of the said association are residents of the Hj. Manan area which will be affected by the privatisation scheme intended by the Government of the State of Johor.

(2) The respondent has issued notices to vacate/quit to all the residents in the Hj. Manan area to pave the way for the intended privatised development.

(3) The reliefs sought for are orders of, *inter alia*, certiorari to quash the decision made by the respondent to issue the said notices to quit and to prohibit the respondent from issuing similar further notices until an agreement is reached between the Hj. Manan residents and the private developer regarding compensations to be made to the residents.

(4)The grounds upon which the said reliefs are sought are as follows:

(i) The private developer has met with and agreed to compensate the residents but the terms have not been agreed upon;

(ii) The Menteri Besar of Johor has announced on not less than one occasion that the private developer must and will compensate the residents;

(iii) In view of the above, the residents have legitimately expected to be compensated before they are required to vacate their respective places of residence/business;

(iv) In acting as the respondent had done, the residents' private rights have been affected;

(v) The respondent had exercised his powers unfairly, unreasonably and in bad faith when he decided to issue notices to quit in the circumstances; and

(vi) In the alternative, the respondent had exercised his powers mechanically without exercising proper discretion when he merely followed directions from the Johor State Planning Unit.

Affidavit in Support

In the affidavit in support of this originating motion, the applicants Stated, *inter alia*, as follows;

(1) *Vide* letter dated 30 May 1994, which was received by the residents in June 1994, the Land Administrator, Kluang, gave notice to quit to the above residents and the dates to quit are fixed according to the phases of developement, *viz.*

Phase	**Date to Quit**
First	On or before 1 July 1994
Second	On or before 1 October 1994
Third	On or before 1 December 1994

(2) The chairman of the Association then wrote a letter to the said Land Administrator requesting that the notice to quit be withdrawn. One Encik Ahmad Abdullah from the Land Office Kluang has orally agreed to postpone the date to quit.

(3) *Vide* letter dated 4 August 1994, the said Land Administrator again gave another notice to quit to the residents in phase 1, so as to quit the land, latest by 1 September 1994.

(4) Subsequently, the chairman of the association wrote a letter to the said Land Administrator for extension of time to quit but the said Land Administrator has rejected the residents' application for extension of time.

(5) The residents have stayed on the said land with the permission of the government for about 80 years. It is not fair for the government to evict them with such a short notice.

Affidavit in Reply

The Land Administrator in his affidavit in reply states that:

(a) the applicants and the residents are occupying State land;

(b) the applicants and residents have occupied the State land in contravention of the law and so they have no right to be there;

(c) the State government wishes to develop the said area; and

(d) the notice issued by the respondent is in accordance with the law.

Submission for the Applicants

The applicants and all the residents ("the applicants" for brevity), have been staying on the said land as holders of temporary occupation licence (TOL) until 1992 when the licence expired and no new TOL was issued thereafter. The applicants do not deny that since 1992 they have been occupying the State land without any legal authority whatsoever.

Learned Counsel for the applicants submitted that the applicants have paid the assessment in respect of their premises to the local authority and that they have the legitimate expectation to remain on the land. That legitimate expectation gives them the right to occupy the State land.

Although there have been offers for compensation by the developer (who signed the privatisation agreement to develop the State land), learned Counsel informed the Court that he is challenging the factors surrounding the issue of the notice of eviction. Meanwhile the developer's offers for compensation to the applicants have been rejected by the applicants and hence this originating motion to resolve the matter in accordance with the due process of law.

The applicants are relying on the authority of the *Re Application by Dow Jones (Asia) Inc*. [1988] 1 MLJ 222 to the effect that at this stage, "if on a quick perusal of the material available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief" (per Lord Diplock in *Inland Revenue Comrs. v. National Federation of Self-Employed and Small Businesses Ltd*. [1982] AC 617; [1981] 2 All ER 93.

In that context, it was submitted that:

(a) the legitimate expectation of the applicants has been dashed;

(b) it is arguable whether the respondent has exercised his dicretion in a reasonable manner;

(c) the notice is arguably unreasonable;

(d) the decision to issue the notice is challengeable;

(e) the *bona fide* of the exercise of power is questionable - the exercise is *mala fide*.

Submission for the Respondent

It was submitted for the respondent that before the Court grants leave to issue certiorari, it is incumbent upon the Court to look at other existing remedies which are available to the applicants. If other remedies are found to be available, then the applicants ought to pursue that remedy or those remedies first, in which case this application should be dismissed *in limine*.

The applicants herein are persons who are aggrieved by the decision of the Land Administrator to issue the notice to quit, pursuant to the National land Code 1965 (NLC). Section 418 of the NLC provides for the remedy of appeal. That being the case, the applicants should pursue the remedy of appeal and not by way of certiorari.

There is no evidence of the applicants having paid the assessment at all in the affidavit in support of this originating motion or in the Statement of facts made under O. 53 r. 1(2).

The Issues before the Court

From the originating motion and all supporting affidavits, the affidavit in reply and all the exhibits annexed thereto, I find that the issues before the Court may be identified as follows:

(1) where the decision of the said Land Administrator is made under and pursuant to the provisions of the NLC and s. 418 thereof makes available to the aggrieved person/s i.e., the applicants herein the remedy of appeal, can the applicants apply to this Court for leave to issue certiorari without first exhausting the remedy of appeal?

(2) whether, on the facts as disclosed in all the affidavits filed herein, there is an arguable case to enable the Court to exercise the discretion to grant leave to issue certiorari?

Issue 1: Application for leave to issue certiorari without exhausting the remedy of appeal
It is common ground that the decision of the said Land Administrator is made pursuant to the NLC. Under the NLC, s. 418 provides for the remedy of appeal. It reads as follows:

418. **Appeals to the Court**

(1) **Any person or body aggrieved by any decision under the Act** of the State Director, the Reigstrar or **any Land Administrator may**, at any time within the period of three months beginning with the date on which it was communicated to him, **appeal therefrom to the Court**.

(2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just

(3) In this section "decision" includes any act, omission, refusal, direction or order.

Issue (1) as Stated above has previously come up for determination by our Courts. The principle enunciated by our Courts has been consistent for a period of 21 years i.e., from 1951 to 1972. This principle has been authoritatively Stated by Hashim Yeop A. Sani SCJ (as he then was) in *Government of Malaysia & Anor. v. Jagdis Singh* [1987] 2 MLJ 185, at 186 as follows:

> The first principle to note is that certiorari is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred to as an "extraordinary" original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary (see Professor Jain's Administrative Law of Malaysia and Singapore, p. 360).
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> There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.

However, in 1983 the then Federal Court in *Lai Cheng Cheong v. Sowartnam* [1983] 2 MLJ 113 took a different view. This Federal Court decision was not followed by the Supreme Court. Hashim Yeop A. Sani SCJ (as he then was) in the *Jagdis* case further observed that the principle followed by Wan Suleiman, FJ, in the *Sowaratnam* nevertheless followed the same principle i.e. "when there is an alternative and convenient form of appeal, it is not for the Court to interfere unless the allegation of want of jurisdiction or breach of the rules of natural justice is a clear and simple case in which it is evident that to come here rather than pursue the more traditional lines of appeal is going to result in a saving of time or expense". per Lord Widgery in *Regina v. Special Commissioners of Income Tax (Ex Parte Morley)* [1972] 49 TC 71. Although the Federal Court appears to have arrived at a decision which is apparently at variance with the decision of the Supreme Court, the underlying principles applied by the Federal Court and the Supreme Court seem to be consistent and despite the different conclusions of the two different Courts, I am of the view that the Supreme Court decision has Stated the correct principle of law. In the light of the above, I am of the view that the Supreme Court decision in *Jagdis* is to be preferred and should be followed here, as has been followed by Lamin J. in *Re Low See Kim* [1988] 3 MLJ 110.

In the *Jagdis* case, Hashim Yeop A. Sani, SCJ, added that:

> A clear principle is reiterated here, i.e. it is not a rigid rule that whenever there is appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the Court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

The applicants herein have an alternative remedy of appeal under s. 418 of the NLC. This is the domestic remedy which is of special application to the applicants. It is a statutory right conferred upon the applicants and other persons similarly circumstanced and should be exhausted by the applicants first before they can invoke the remedy for judicial review by way of certiorari. It is the duty of the applicants to prove the existence of very exceptional circumstances in order to obtain leave from the Court to issue certiorari. The applicant's affidavit has not deposed to any exceptional circumstance at all. I therefore answer the question posed in issue (1) above in the negative.

Issue 2: Is There An Arguable Case?

The legitimate expectation raised by the applicants is grounded upon the payment of assessment by the applicants to the local authority for the use of the premises on the State land. Such payment has been seriously disputed by the repondent.

Section 101(1) of the Evidence Act 1950 provides for the burden of proof. It reads:

> 101. **Burden of proof**
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> (1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Further the payment of assessment is a matter within the specific knowledge of the applicants and the burden of proving this fact is on the applicants. Section 106 of the Evidence Act 1950 and illustration (b) thereunder provides as follows:

> 106. **Burden of proving fact especially within knowledge**
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> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
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> Illustrations
>
> (a) ...
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

I find as a fact that the applicants have not discharged the burden of proof as required of them under s. 101(1), s. 106 illustration (b) of the Evidence Act 1950. The affidavit in support of this originating motion and the applicants' Statement of facts made no mention or reference whatsoever to the payment of the assessment by the applicants to the local authorities. This originating motion is heard and determined on the basis of affidavits. It is absolutely essential for the applicants with the sound and well-considered advice of their learned Counsel to State in clear, concise and candid terms all the curcial facts in order to enable the Court to give due consideration thereto in order to arrive at a decision on the matter brought before the Court.

It has been admitted by the applicants that they have been occupying the State land since 1992 in contravention of the law. They are indeed squatters since 1992. The status of squatters has been clearly defined by the then Federal Court in *Sidek bin Haji Muhamad & 461 Ors. v. Government of the State of Perak & Ors.* [1982] 1 MLJ 313, at 314 as follows:

> In our opinion there is one issue which lies at the heart of this case. It is whether the appellants have a cause of action against the respondents. The answer is obvious. It is clear beyond doubt that they cannot succeed because they are squatters. Squatters have no right either in law or in equity. (See *Mcphail v. Persons Unknown CA*) It does not lie in their mouths to assert that they used and occupied the land as squatters.
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> Their position under the National Land Code is not dissimilar. Section 48 of the Code is against them. It says that "No title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.... Section 341 of the Code empowers the State Authority to dispossess any squatters at any time. So the limitation period does not operate against the State. What equitable right or interest can be conjured up for the squatters who have illegally occupied State land? Squatters go into possession by, or as a result of, illegal occupation of State land. Illegal occupation of State land is an offence under s. 425 of the National Land Code. It is well established that a Court of equity will never assist squatters to resist an order of possession legally acquired; it will never intervene in aid of wrong-doers. (See *Grafton v. Griffin*). We would like to say this at once about squatters. The owner is not obliged to go to the Courts to obtain an order of possession. He is entitled, if he so wishes, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the Courts of law. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question. The decision of the English Court of Appeal in *Hemmings v. Stoke Pages Golf Clubs*....
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> The case falls within the broad principle that 'where an Act creates an obligation, and empowers the obligation in a specified manner, we take it as a general rule that performance cannot be enforced in any other manner': (see *Doe D. Rochester (BP.) v. Bridges*). Likewise here in the case of landless. It cannot have been intended by Parliament in enacting the National Land Code that every person who was in need of land should be able to sue the government for it or to take the law into his own hands for the purpose. So the Courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellants find themselves. But we can go no further. They must make their appeal for help elsewhere, not to us.

In the circumstances, I hold that there is no arguable case here and on the application of the law to the facts of this case, I dismiss this application with costs.